

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2006 Session

STATE OF TENNESSEE v. SHELVEY A. BAKER

**Direct Appeal from the Criminal Court for Davidson County
No. 2002-A-112 Cheryl Blackburn, Judge**

No. M2005-00298-CCA-R3-CD - Filed September 14, 2006

The defendant, Shelvey A. Baker, was convicted of second degree murder. See Tenn. Code Ann. § 39-13-210 (1997). The trial court imposed a sentence of twenty-five years to be served at one hundred percent. In this appeal as of right, the defendant argues (1) that the trial court erred by refusing to dismiss the indictment and (2) that the evidence was insufficient to support the conviction. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

David A. Collins, Nashville, Tennessee, for the appellant, Shelvey A. Baker.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

At approximately 8:00 p.m. on July 14, 1999, the victim, Terrance Wilkins, was with his girlfriend, Patricia Harris, and two other men in the parking lot of the Barcelona Apartments. When Ms. Harris left to buy some beer, "everything was fine," but upon her return about twenty to twenty-five minutes later, a medic was treating the victim as he lay on the ground. After being transported by ambulance to the hospital, the victim, who had been shot, was pronounced dead. In the course of the investigation, the defendant was identified as a suspect by the Metropolitan Nashville Police Department and ultimately charged with the crime.

In the trial, which was some five years after the murder, Ms. Harris testified that on the evening prior to the shooting, she had argued with the victim, who was drinking and smoking

marijuana while also on medication to treat a chemical imbalance. During the course of the argument, the victim had kicked in her front door and broke a mirror in her apartment.

Sarah Hill, who was a resident of Barcelona Apartments when the shooting took place, was in police custody for an attempted forgery conviction at the time of the trial. She testified that the defendant, known to her as T-Loc and as a member of the Crips gang, confessed to her that he had killed the victim. Ms. Hill recalled that on the night prior to the shooting, the victim also had an argument in the apartment complex parking lot with a woman she could identify only as Tamara. She stated that she and a roommate, Nikki Napier, had intervened during the altercation by asking to borrow a compact disc. She testified that the victim became defensive, yelled at the women, and ordered them to leave. Ms. Hill stated that when she returned to her apartment, she told her boyfriend, Anthony Johnson, about the incident and that Johnson and Clifton Smith, Ms. Napier's boyfriend, left to confront the victim. According to Ms. Hill, Ms. Napier, who was still with the victim and Tamara, claimed that the victim had pushed her down. She recalled that the victim apologized to her and the two men and that "everything . . . was basically squashed."

Ms. Hill testified that the defendant, who was armed with a gun, and a man named Chris Goodbread had made a visit to her apartment on the following night. She stated that the two men left in the company of Smith and that some fifteen or twenty minutes later, she heard three gunshots. According to Ms. Hill, Smith returned to the apartment "look[ing] like he had seen a ghost" and informed her that the defendant had just shot "Little Buddy." While acknowledging that she did not disclose everything she knew to the detectives who investigated at the scene on the night of the murder, she recalled that after the police left, the defendant telephoned Ms. Hill, directed her not to say anything, and explained that he had shot the victim because he had pushed Ms. Napier. She testified that the defendant, who appeared to have a romantic interest in Ms. Napier, bragged about how the victim fell after being shot. Ms. Hill, who had also been incarcerated for facilitation of especially aggravated robbery, confirmed that Johnson, Smith, and Ms. Napier were Crips gang members.

Clifton Smith, who at the time of trial was incarcerated for especially aggravated robbery and facilitation to commit first degree murder, identified the defendant as having fired the shot that killed the victim. After confirming that he had been informed by Ms. Napier and Ms. Hill that the victim had struck them the night before the shooting, he testified that he met the defendant and Goodbread for the first time on the following day. Smith recalled that when he left the apartment with the two men, they just happened to see the victim, who tried to explain that he had not assaulted the two women. Smith stated that he believed the victim but when he began to shake his hand, the defendant suddenly shot the victim three or four times. Smith testified that he panicked, ran to Ms. Hill's apartment, informed her and Ms. Napier of the shooting, and then traveled to his mother's house. According to Smith, no one displayed a gun on the night of the shooting until the defendant shot the victim. He testified that the victim was shot from the front or from a side angle. Smith acknowledged that he had no excuse for not reporting the incident to the police.

Chris Goodbread, who was fifteen at the time of the shooting and had known the defendant for three or four years prior to that, testified that he traveled to the Barcelona Apartments with the defendant and heard a discussion about an incident involving some girls on the previous night. He stated that when one of the women informed the men that the victim was outside, he left the apartment with the defendant and Smith in order to confront him. Goodbread claimed that he tried to distance himself from the three men when they got into a heated discussion and he paid little attention to the conversation until the defendant fired the gun. He maintained that he was not sure whether the victim had been shot because he saw him "just turn[] like he was fixing to run away." Goodbread testified that he immediately fled toward another apartment complex and that the defendant caught up with him halfway there. He claimed that he asked why the victim had been shot and that the defendant, in response, "[j]ust kind of smiled and was kind of hyper, scared, and really didn't say much at all." He recalled that the defendant then dumped the shells from the revolver before the two men walked to the house belonging to the defendant's aunt. Goodbread testified that when the police questioned him a week or two later, he led them to the location where the shells had been discarded.

Anthony Johnson, who was incarcerated at the time of trial for aggravated robbery and who also faced felony drug charges, was dating Ms. Hill at the time of the shooting. He testified that on the day he and Smith were told by Ms. Napier and Ms. Hill that the victim had struck them, they tried to confront the victim but he fled. Johnson explained that he had met the defendant only once before. He claimed that he had no recollection of having told his attorney or the district attorney that the defendant had made any incriminating statements in his presence.

Nikki Napier, who was incarcerated at the time of trial, initially refused to cooperate as a state witness. When threatened with contempt, she agreed to respond to questioning but was evasive, insisting that she could not remember the incident and could not recall her statements to police or the assistant district attorney. She did testify, however, that during an argument with a man on the day before the shooting, the man hit her. She explained that Smith and Johnson chased him away. She indicated that she had overheard several people, including the defendant, admit to the shooting. Ms. Napier acknowledged that the defendant, Goodbread, and Smith were all in her apartment on the night of the murder and on cross-examination explained that she had "blocked everything out" about the incident. She admitted that she did not believe any of the men who had admitted to shooting the victim.

By stipulation, the state then read the deposition of Michelle Knight, an investigator with the Davidson County Sheriff's Office. Officer Knight testified that she had recorded a telephone conversation the defendant had while he was incarcerated in the county jail. She identified an audiotape of the conversation, explaining that the tape was made from a computerized recording system. The tape contained a statement by the defendant to his mother that he is "locked up" because he "took care of my business and killed a n[****]r." When asked if he was admitting to killing someone, he responded, "Yep! On, on the phone, yep!"

Metropolitan Nashville Police Department Detective Bill Pridemore testified that because he had interviewed the defendant, he had become familiar with his voice. He then identified the voice of the defendant on the taped telephone conversation.

Officer William Kirby, who investigated the crime scene, testified that because of darkness, he did not find any projectiles or weapons at the scene on the night of the murder. He confirmed that he did recover three shells two weeks later that were several hundred yards away from where the victim lay after the shooting.

Tennessee Bureau of Investigation (TBI) Agent Steve Scott, who examined the bullet and shell casings recovered near the crime scene, determined that the casings were .38 caliber. It was his view that the bullet recovered from the victim's body was either a .38 or .357 caliber and was consistent with having been fired from one of the three shell casings recovered at the crime scene.

Dr. Bruce Levy, Chief Medical Examiner for the state and the medical examiner for Davidson County, performed an autopsy. He testified that a bullet entered the upper-right portion of the victim's back and passed through his right lung and his heart before coming to rest just beneath the skin on the left side of his chest. It was his opinion that the victim died from internal bleeding from the wounds. Dr. Levy, who concluded that the alcohol content of the victim was not at an intoxication level, determined that he had smoked marijuana before his death.

Leonard Hallum, the defendant's uncle, testified for the defense as part of an effort to establish an alibi. He claimed that the defendant, whom he had met two weeks prior to the murder, was at his house at 4:15 p.m. on the afternoon of the shooting. Hallum, who lived within walking distance of the crime scene, stated that he did not know the names of any of the defendant's friends.

Nathan Norman, the defendant's cousin, claimed that from 4:00 p.m. to 8:00 p.m. on the evening of the murder, he and the defendant played a video game. He recalled that at 9:00 p.m., his mother returned to his residence and informed them that there were police at the Barcelona Apartments. He testified that he walked to a friend's apartment in the Barcelona complex, asked what had happened, and, when he returned to his residence at approximately 11:00 p.m., the defendant was not present.

Autumn Norman, another of the defendant's cousins, testified that the defendant was at the residence when she returned from school on the afternoon of the shooting. She stated that because the defendant was new to the neighborhood, no one knew he was living there. She claimed that nobody either telephoned him or stopped by the residence that afternoon. She claimed that the defendant never went anywhere during his time at her residence and had not made any friends.

Marsha Hallum, the defendant's aunt, testified that she helped raise the defendant because his mother was abusive toward him as a child. She recalled that on the night of the shooting, she arrived home at between 8:30 and 9:00 p.m. and saw several police cars at the nearby Barcelona

Apartments. She claimed that when she went to bed at 9:30 p.m., the defendant was at her home.

James Norman, another of the defendant's cousins, testified that on the night of the shooting, the defendant joined him, a friend, and the friend's girlfriend for an evening at a strip club. He claimed that they left between 9:00 and 10:00 p.m. and returned between 2:00 and 3:00 a.m. He described the defendant as having been in a fair mood when he first saw him that night. On cross-examination, he acknowledged that he was asked for the first time on the day before the trial about the defendant's whereabouts on the night of the shooting, which had taken place some five years earlier.

Dexter Norris, a pastor who was living at the Barcelona Apartments on the night of the murder, testified that he was walking his dog when he heard three shots. He stated that he then saw a young African American male run past him with a gun in his hand. According to Norris, his dog broke free from his collar and chased the man. He testified that after he caught his dog, he went to the victim and, when the same man who he had seen run from the scene joined the gathering crowd, the dog "started having a fit." Norris also recalled seeing a red car, driven by a white woman, pull out of the parking lot as the man was running away. He recognized the man, an individual other than the defendant, as a drug dealer and learned that the police had arrested him that night. On cross-examination, Norris acknowledged that when he was interviewed on the night of the shooting, he told police that the man ran by him about five minutes after he had heard the shots. He also conceded that he had told police that the gun the man was carrying looked like a semi-automatic pistol, not a revolver.

Terry Hale, a resident of the Barcelona Apartments on the night of the shooting, testified that he heard three gunshots, grabbed a phone, ran to the window, and saw the victim take one or two steps before falling to the ground. He estimated the distance from his residence to where the shooting occurred to be about thirty or forty feet. He stated that he did not see anyone other than the victim after the shots were fired. He testified that after he called 911, he went to the victim in an effort to help and remained there until emergency personnel arrived. He recalled that from the time he first looked out the window, the victim was within his sight except for the "split second" it took for him to get from his window to his front door.

Paul Hines, who was arrested as a suspect on the night of the shooting, testified that he was the first person to reach the victim after he had been shot. He claimed that no one else approached the victim until the ambulance arrived. He stated that he was arrested for the shooting and released without explanation one hundred days later.

Detective Jim Fuqua, the lead investigator in the case, testified as a defense witness. He determined that Goodbread and Smith were the only two eyewitnesses and identified Hines as the initial suspect before concluding that the case against him was "a little thin." The detective explained that he eventually learned about the incident involving the victim which had occurred on the night before the shooting and was then able to pursue the leads that ultimately developed the defendant as the primary suspect.

In rebuttal, the state re-called Detective Fuqua, who testified that the defendant had admitted that he was present when the shooting occurred. He stated that in his initial interview, the defendant claimed that Smith had shot the victim and then led him to where he thought the shell casings might be. None, however, were found. The detective testified that Goodbread, as Officer Kirby had confirmed in his testimony, later located the shells at a point near the area identified by the defendant. He recalled that during a second interview, the defendant later claimed that he gave Smith the bullets that were used to shoot at the victim.

I.

The defendant first asserts that the trial court erred by refusing to dismiss the indictment. Specifically, he claims that the delay in presenting the case to the grand jury violated his due process rights. The state submits that the delay was not intentional as a means of gaining a tactical advantage and that the defendant had failed to demonstrate substantial prejudice as the result of the time which had elapsed between the shooting and the indictment.

The crime occurred on July 14, 1999. The defendant was indicted two and one-half years later on January 25, 2002. The trial was conducted on August 23 and 24, 2004. At the hearing on the motion to dismiss the indictment, Detective Fuqua acknowledged that he had created a case file on the Terrance Wilkins murder and delivered it to the district attorney's office no later than August of 1999, only a few weeks after the crime. The evidence offered at the hearing established that a year later, when a separate trial involving the defendant was about to begin, the detective inquired as to the status of the murder case and learned that the district attorney's office had lost the file. The detective prepared another case file and forwarded it to T.J. Haycox, who was with the "fast track" unit in the office, a unit designed to "speed[] up the legal process." In a letter dated October 18, 2000, Haycox, who had left the office by the time of the hearing on the motion, notified Detective Fuqua that the case would not be prosecuted. When the victim's mother learned of the decision, she complained to Detective Fuqua, who referred her to the district attorney's office. When she voiced her concerns to office personnel, the indictment process "started immediately." Detective Fuqua could not identify any possible advantage to the prosecution for delaying the case. Later, Haycox, who had moved out of state, explained to Detective Fuqua that he had decided not to present the Wilkins murder to the grand jury because of the lengthy sentence the defendant received in the unrelated murder case.

At the hearing, Dan Hamm, the assistant district attorney who had apparently been sent Detective Fuqua's initial report, claimed that he had no recollection of the Wilkins murder being assigned to him in 1999. Deputy District Attorney General Tom Thurman, who supervised the "fast track" program, was critical of Haycox. He testified that general office procedure required his review and that he also had no recollection of any conversation with Haycox or any involvement in the case before the initial decision not to prosecute. He did, however, recall the separate murder charges brought against the defendant for his involvement in crimes committed at a Waffle House in Davidson County. General Thurman explained that while he himself "would never say don't prosecute a murder case because [the defendant] is already serving a certain amount of time in prison," Haycox did have the authority during the term of his employment to determine whether or

not to pursue a prosecution. General Thurman nevertheless insisted that Haycox should have discussed the issue with him before making a decision of that nature.

On cross-examination, General Thurman contended that had he been aware of the Terrance Wilkins charge, he would have likely tried it first in hopes of a conviction and then using this murder as a possible aggravating circumstance in the separate Waffle House case, thereby warranting a request for the death penalty or a sentence of life without parole. In response to questioning, he stated that he would not have delayed the prosecution of the Wilkins case as a means of deterring the defendant from filing a petition for post-conviction relief in the Waffle House murders. General Thurman testified that when he learned about the facts surrounding the shooting of Wilkins, he overruled Haycox's decision not to prosecute.

At the hearing on the motion, the defendant testified that he had moved into his aunt's house just prior to the Wilkins shooting. He insisted that he could not remember what he did that day or that night. The defendant admitted that he would not have had a better recollection about the day of the Wilkins shooting had he been asked about it in late 1999 or early 2000 but nevertheless maintained that his "whole family could [have] provide[d] an alibi because . . . I was new out there. I didn't know [any]body so the only reasonable place I can remember is either going to work with my auntie or being at home with my little cousin or somebody like that." The defendant acknowledged that his memory was the "same" at the time of the hearing as it would have been one day after the incident. It was his recollection that the Wilkins murder case was not discussed during the plea negotiations in the Waffle House murders.

The trial court denied the defendant's motion to dismiss the indictment after concluding that his due process rights were not violated by the pre-indictment delay. It found that there was no intent on the part of the District Attorney's office to delay the matter and that the mistake was solely attributable to "bureaucratic negligence" rather than an attempt to obtain a tactical advantage or to otherwise harass the defendant. "[T]his matter unfortunately slipped through the cracks." The trial court further determined that the defendant failed to demonstrate actual prejudice.

Under our law, the right to due process as afforded by the Fifth Amendment to the United States Constitution proscribes excessive pre-indictment delay of criminal charges. Rule 48 of the Tennessee Rules of Criminal Procedure provides that "[i]f there is unnecessary delay in presenting the charge to a grand jury against a defendant who has been held to answer to the trial court, . . . the court may dismiss the indictment." Tenn. R. Crim. P. 48(b). In order to achieve dismissal based upon pre-indictment delay, the defendant must show that (1) the delay caused substantial prejudice to his rights to a fair trial and (2) the delay was an intentional device to gain tactical advantage over the accused. United States v. Marion, 404 U.S. 307, 324 (1971); State v. Baker, 614 S.W.2d 352, 354 (Tenn. 1981); State v. Dunning, 762 S.W.2d 142, 144 (Tenn. Crim. App. 1988).

The period of delay between the shooting in July of 1999 and the indictment in this case was two and a half years. The defendant conceded at the time of the hearing on the motion to dismiss that his memory of the time and events surrounding the shooting was no different than it would have

been one day after the incident. He argued prejudice, however, because his family members could have provided him with an alibi. In fact, several of his family members did testify in an effort to establish an alibi defense. Each of them remembered the date of the shooting for different reasons and some provided helpful alibi evidence. The defendant offered no other proof as to why his right to a fair trial had been substantially prejudiced by the pre-indictment delay. For example, he did not assert that access to physical evidence was compromised or that he was unable to secure any particular witness on his behalf as a result of the delay in the prosecution. Further, the defendant has failed to demonstrate that the delay was an intentional device by the state to gain a tactical advantage over the accused.

The trial court found that the "delay of the indictment was essentially a result of bureaucratic negligence" by the Office of the District Attorney and not intentionally designed to gain any advantage. In our view, that holding was not meant to trivialize the magnitude of the oversight. That none of the prosecuting attorneys had any recollection of having reviewed the file received from Detective Fuqua in 1999, that a first degree murder charge was "lost" for over a year, and that a temporary decision not to prosecute was made without more communication either within the staff or with the family of the victim pays no tribute to the administrative procedures within the office. That does, in fact, qualify as "bureaucratic negligence." In a district of that size, however, a mistake of that nature is at least plausible. Nevertheless, had there been a hint of prejudice to the defense and a modicum of tactical advantage to the state, a dismissal of the indictment might have been warranted. General Thurman testified that upon discovering the circumstances of the case, he immediately pursued an indictment. He maintained that the officer did not delay an indictment in order to obtain a tactical advantage. The defendant did not offer any evidence to the contrary. The trial court accredited the testimony of General Thurman. The record confirms that the trial court did not err by refusing to dismiss the indictment.

II.

The defendant next asserts that the evidence was insufficient to support the conviction. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Here, two state witnesses testified that they saw the defendant shoot the victim. According to another witness for the state, the defendant confessed to having shot the victim. Officers found

shell casings near the scene which were consistent with the fatal bullet, thereby corroborating the testimony of one eyewitness. In a recorded telephone conversation, the defendant admitted to his mother that he was guilty of a murder. Although several of the defendant's family members helped develop an alibi defense, the jury, as was its prerogative, chose to accredit the testimony of the state's witnesses. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). In our view, the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that the defendant committed the crime.

Accordingly, the judgment is affirmed.

GARY R. WADE, PRESIDING JUDGE